IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7010 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BACHUBHAI ALIAS BHAGATSING SABHAJITSING THAKOR

Versus

SURAT MUNICIPAL CORPORATION

Appearance:

1. Special Civil Application No. 7010 of 1997

MR MC BHATT for Petitioner No. 1-3

MR PRASHANT G DESAI for Respondent No. 1

Mr. AJ Patel with Mr. Devang T. Shah for Respondents No. 2 and 3.

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 02/12/2003

CAV JUDGEMENT

The petitioners have filed this petition under Article 226 of the Constitution of India praying for direction from this Court to the respondents to hand over actual possession of two plots bearing Survey Nos. 634/1

and 634/2 admeasuring about 775 sq.meters and 920 sq.meters respectively and to give its effects in the revenue record and to pay compensation of Rs. 70,032/with running interest at 15% p.a. from the date of passing of the award. The petitioners have further prayed for the direction to the Surat Municipal Corporation, the respondent No.1 herein to decide the representation made by the petitioners and compliance of directions given by this Court in Special Civil Application No. 6310 of 1996.

2. During the pendency of the petition, an amendment was made in the petition and new prayer was made and granted by this Court, whereby the petitioners have prayed for quashing and setting aside the action under communication dated 13.11.2001 of handing over possession of the disputed land, i.e. the land bearing Final Plot No. 634/1 and 634/2 of Town Planning Scheme No.5, Athwa, Umra to Shri Dilipbhai Thakorbhai Desai and Smt. Induben Dilipbhai Desai, respondents No. 2 and 3 respectively and also praying for declaration that the handing over of possession to the respondents No.2 and 3 is unauthorised, illegal and invalid, and further direction to the respondent No.1 Corporation to restore the possession of disputed land to the petitioners and to put the petitioners in actual physical possession of the said disputed land.

3. Mr. MC Bhatt, the learned Advocate appearing for the petitioners submitted that the petitioners have purchased 15254 sq.mtrs. of land situate at Survey No. 16 of Surat Municipal Corporation by registered Sale Deed dated January 31, 1968. At the time of introducing the Town Planning Scheme, the entire strip of land was kept reserved for public purpose and in lieu thereof two plots bearing Survey Nos. 634/1 and 634/2 admeasuring about 775 sq.meters and 991 sq.meters respectively were given to the petitioners and in addition to that, compensation of Rs. 70,032/- was awarded to the petitioners which included claim for superstructures.

4. Mr. Bhatt has further submitted that the petitioners have purchased the land in question from one Dilipbhai Thakorbhai Desai who had become owner of the land by way of a family settlement, i.e. the registered release deed and under the terms and conditions of the said registered release deed, the land in question came to the share of the Shri Dilipbhai Desai. From the date of the execution of the registered sale deed in favour of the petitioners, the petitioners were in possession of the land in question and accordingly their names have

been entered into the City Survey Property Card.

5. It is further submitted that even the State of Gujarat has also issued a Sanad in favour of the petitioner No.1 on 16.12.1975.

6. It is further submitted that after coming into force of Urban Land (Ceiling & Regulation) Act, 1976, the petitioners have filled-in the necessary form under Section 6 of the said Act and on the basis of the said form, on 20th May 1985 and June 19, 1993, orders have been passed by the competent authority under the ULC Act.

7. It is further submitted that despite the above facts and despite repeated requests to the respondent Corporation to comply with the order passed by the Board of Appeal in Appeals No. 1/1972 and 55/1972, the respondents neither replied the application nor complied with the award of the Board of Appeal which came to be confirmed by the Division Bench of this Court on September 2, 1976 in Special Civil Application No. 247 of 1974. It is further stated that by not complying with the award passed in favour of the petitioners, the respondent Corporation has caused grave injustice to the petitioners whose very valuable land admeasuring 15254 sq.meters have been kept reserved for public purposes and in lieu thereof nothing has been given to the petitioners by the respondent Corporation. Because of such inaction on the part of the respondent Corporation, the petitioners were constrained to file Special Civil Application No. 6310 of 1996 before this Court wherein this Court vide its order dated 16.1.1997 directed the petitioners to satisfy the respondent Corporation regarding their ownership right and has also given direction to the respondent Corporation to comply with the award passed by the Board of Appeal. Pursuant to the said order the petitioners have immediately approached the respondent Corporation with necessary documents. The respondent Corporation had however not decided nor any benefit was given to the petitioners for which they were entitled to.

8. Mr. Bhatt has further submitted that during the pendency of this petition, on 13.11.2001, the petitioners were served with the communication wherein the respondent Corporation has indicated that the possession of the land in question was handed over to Dilipbhai Thakorbhai Desai and Smt. Induben Dilipbhai Desai, the respondents No. 2 and 3 respectively. The petitioners have therefore challenged the said action of handing over possession of the disputed land to respondents No. 2 and 3 by moving

necessary amendment to the present petition which was granted in L.P.A. No. 32 of 2002 by the Division Bench of this Court. The petitioners have submitted that the said action of handing over possession of disputed land to respondents No.2 and 3 vide communication dated 13.11.2001 was absolutely illegal, arbitrary, malafide, ultra vires and contrary to the express provisions of law and it was taken with ulterior motives. It was further stated that the said action was taken malafide with a view to overreach the process of law. It was further submitted that by order dated 16.1.1997 passed in Special Civil Application No. 6310 of 1996 this Court has directed the Surat Municipal Corporation to pass appropriate orders on petitioners' grievance with regard to handing over possession of the disputed land. Despite this order passed by this Court way back in January 1997, the respondent Corporation has not complied with the directions issued by this Court for a period of more than 4 years and all of a sudden during Diwali vacation on 13.11.2001 and that too when the petition was already listed on Board and it was at that stage of final hearing the possession of disputed land was handed over to respondents No. 2 and 3. The respondent Corporation has never informed the petitioners that their representation was rejected by them.

9. He has further submitted that the order dated 16.1.2001 passed by this Court in L.P.A. No. 10 of 2001 has been totally misinterpreted by respondent Corporation as in the said order nowhere it was directed to hand over the possession of final plot No. 634/1 and 634/2 to respondents No. 2 and 3.

10. Mr. Bhatt has further submitted that the intention to frame town planning scheme was declared by the respondent Corporation on 16.3.1967, under Section 20(1) of the Bombay Town Planning Act. The Government of Gujarat sanctioned the draft Town Planning Scheme on 24.4.1968. The Town Planning Scheme was finally sanctioned on 25.1.1972 and in view of the provisions contained in Section 51 of the Bombay Town Planning Act, town planning scheme became part of the law. It was further submitted that the Gujarat Town Planning and Urban Development Act, 1976, has come into operation on 1st February 1978 and by virtue of Section 124 of Gujarat Town Planning Act, the Bombay Town Planning Act of 1954 stood repealed except the saving clause. The Town Planning Scheme framed under Bombay Town Planning Act of 1954 can now be implemented only under the Gujarat Town Planning Act of 1976 but no amendment can be made in the scheme. It was further submitted that as per the

finalised Town Planning Scheme, the petitioners are allotted Final Plot No. 634/1 and 634/2 and hence except the petitioners, Town Planning Authority cannot allot or put any other third party in possession of disputed land. Except the Court of competent civil jurisdiction, no authority can consider the question of title of the land after finalisation of Town Planning Scheme.

11. Mr. Bhatt has further submitted that after finalisation of Town Planning Scheme on 25.1.1972, original Survey No. 16 did not exist. The tenure of the land did not exist. Occupancy also did not exist. In the eye of law the said property did not exist and the property has vested in the respondent Corporation for the project of Ring Road and therefore the tenancy proceedings commenced in respect of old Survey number in 1994 are totally misconceived and they cannot alter or change or modify the allotment of Final Plot No. 634/1 and 634/2 made in favour of the petitioners. It was therefore submitted that proceedings under Section 84(c) of Bombay Agricultural Land and Tenancy Act were commenced in 1994 in respect of the property which never existed in the eye of law. The petitioners were therefore entitled to allotment and were also entitled to be put in possession of Final Plot No. 634/1 and 634/2 in view of the finalised town planning scheme. It is further stated that the respondent Corporation has no authority, powers and jurisdiction to act as Town Planning Authority under the Gujarat Town Planning Act, 1976 and hence the impugned action of handing over of possession of disputed land is ultra vires the powers of Town Planning Authority.

12. He has further submitted that the original-owners from whom the land had been purchased by the petitioners, had thereafter, tried to obstruct the ways of the petitioners by tendering various types of applications and filing petitions and resorting to various types of proceedings with ulterior motive of harassing the petitioners and to have undue advantage on the fact that prices of the land in the Athwa Lines area have gone up tremendously and till this date the names of the petitioners have not been entered into in Village Form 7/12 due to the mischief committed by the revenue authorities.

13. On the basis of the above facts and submissions, Mr. Bhatt has prayed that relief claimed in the petition should be granted by this Court.

14. No sooner Mr. MC Bhatt, the ld. advocate

appearing for the petitioner started making submissions, Mr. AJ Patel, the ld. advocate appearing for the respondents No. 2 and 3 raised preliminary objections against the maintainability of the present petition. These preliminary objections are now dealt with along with his other submissions on merits. He has submitted that the present petition is not maintainable in view of the order passed by this Court in Special Civil Application No. 6310 of 1996. He has submitted that in the said petition vide prayer B of Para 9, the petitioners have prayed for direction to the respondents to pay the additional compensation of Rs. 70,032/- with running interest at the rate of 15% p.a. and also for handing over the actual possession of two plots bearing Survey No. 634/1 and 634/2 admeasuring about 775 and 921 sq.meters respectively along with its effect in the revenue record. In the present petition also, the prayer is practically the same with slight modification in the composition of the sentences. In the present petition also relief for possession of plots is prayed for. He has further submitted that in view of the order passed in the earlier petition, 2nd petition claiming the same relief is not maintainable as the mandamus issued in the earlier petition is still operating. He has further submitted that in earlier petition, the petitioner was directed to produce the sale deed but he failed to do so and hence the present petition is not maintainable in view of the relief granted earlier which is still operative. Mr. Patel has further submitted that the present petition is filed on the ground that the order passed in the earlier petition was not complied with by the respondent Corporation.

15. Mr. Patel, after taking the Court through the prayers of both the petitions, has submitted that Order 2 Rule 2(3) of the Civil Procedure Code contemplates omission to sue for one of several reliefs. In the present petition, reliefs are based on the same grounds on which the relief was claimed in the earlier petition. The present petition is, therefore, clearly barred in view of the provisions contained in Order 2 Rule 2(3) of Civil Procedure Code. In this connection, he has relied on the decision of the Hon'ble Supreme Court in the case of K.V. George Vs. The Secretary to Govt., Water and Power Dept., - AIR 1990 S.C. 53, wherein, while dealing with the claim petition under Arbitration Act (1940), the Hon'ble Supreme Court has observed that the termination of contract was giving rise to certain issues. The claimant however had not raised them in first claim petition and hence second claim petition raising remaining issues is barred under Order 2 Rule 2 of Civil

Procedure Code. Mr. Patel has further relied on the decision of the Delhi High Court in the case of Delhi Development Authority, New Delhi and Another Vs. M/s. Alkarma, New Delhi - AIR 1985 Delhi 132 wherein it is held that "The view that in no case would the provisions of Order 2 Rule 2 be applicable to arbitration proceedings cannot be accepted. The provisions of O.2 R.2 would apply if the request for referring more disputes to arbitration is made after the making of the award. Once an award has been made, a party cannot be permitted to raise more disputes which he/it could and ought to have raised earlier. Where, however, an award has not been made, it is open to a claimant to ask for more disputes to be referred to arbitration provided the arbitration proceedings are not yet over."

16. Mr. Patel has further submitted that the present petition is barred even by the principles of res judicata or principles analogous to res judicata. In this connection, he has relied on the decision of the Hon'ble Supreme Court in the case of Haridas Mondal v. Anath Nath Mittra - AIR 1961 S.C. 1419, wherein it is held that Section 36 of Bengal Money-lenders Act contemplated filing of one suit and not successive suits for reopening transactions including decrees and obtaining relief under the Act. If in a suit filed for that purpose, a borrower does not obtain relief which he has asked for or abondons his right to relief, it will not thereafter be open to him to institute a second suit for relief which could have been but was not claimed in the earlier suit. The rule contained in O.2 R.2 of Civil P.C. applied to the case and the right to claim relief which could have been but has not been asked for in the previous suit must be regarded as res judicata, under S. 11 of the Civil Procedure Code. Mr. Patel has also relied on the decision of the Hon'ble Supreme Court in the case of Gulabchand Chhotalal Parikh v. State of Gujarat - AIR 1965 S.C. 1153 wherein it is held that "the provisions of S.11, C.P.C. are not exhaustive with respect to an earlier decision operating as res judicata between the same parties on the same matter in controversy in a subsequent regular suit and on the general principle of res judicata, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide, it will operate as res judicata in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-matter. The nature of the former proceeding is

immaterial. There is no good reason to preclude such decisions on matters in controversy in writ proceedings under Art. 226 or 32 of the Constitution from operating as res judicata in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of the finality of decisions after full contest. Consequently on the general principle of res judicata the decision of the High Court on a writ petition under Art. 226 on the merits on a matter after contest will operate as res judicata in a subsequent regular suit between the same parties with respect to the same matter." Mr. Patel has further relied on the decision of the Hon'ble Supreme Court in the case of Daryao and Others. Vs. State of U.P. and Others - AIR 1961 S.C. 1457, wherein it is held that "The argument that res judicata is a technical rule and as such is irrelevant in dealing with petitions under Art. 32 cannot be accepted. The rule of res judicata as indicated in S. 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive res judicata may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of ligitation. If these two principles form the foundation of the general rule of res judicata they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Art.32 of the Constitution of India.

17. Mr. Patel has also objected to the maintainability of the present petition on the ground that the same is barred by the principle of constructive res judicata. In this connection, he has relied on the decision of the Hon'ble Supreme Court in the case of Devilal Modi Vs. Sales Tax Officer, Ratlam & Ors - AIR 1965 S.C. 1150 wherein the assessee challenged the validity of sales tax imposed upon him for a particular year by a petition under Art. 226. The petition was rejected upon merits. An appeal also was dismissed by the Supreme Court upon merits. The assessee had attempted to raise two more additional grounds before the Supreme Court. But the Supreme Court did not allow them on the ground that they had not been specified in the writ petition before the High Court and had not been raised at an earlier stage. Subsequently by writ petition under Art. 226 before the High Court the

assessee once again challenged the same assessment order but on grounds which the Supreme Court had not permitted to be raised by the assessee in the appeal before them in the previous writ petition. The High Court rejected the petition on merits. On an appeal to the Supreme Court, it was held that the second writ petition was barred by constructive res judicata. It was held by the Hon'ble Supreme Court that if constructive res judicata were not applied to such proceedings, a party could file as many writ petitions as he liked and take one or two points every time. That clearly was opposed to considerations of public policy on which res judicata was based and would mean harassment and hardship to the opponent. Besides, if such a course were allowed to be adopted, the doctrine of finality of judgments pronounced by the Supreme Court would also be materially affected." In the case of K.V. George vs. Secy. to Govt., Water and Power Dept. (Supra), the Hon'ble Supreme Court has also held that a claimants raising some of the issues arising out of termination of contract in first claim petition, are precluded from seeking second reference for remaining issues, by virtue of the principle of constructive res judicata. Mr. Patel has further relied on the Division Bench judgment of this Court in the case of Prof. M.J. Pathakji v. Union of India And Others - 26(2) GLR 839, wherein it is held that "the present attempt of the petitioner to submit that on the interpretation of clause 5 of the impugned resolution as made by the Division Bench in earlier petition extending it to ex-Govt. servants who joined private Govt.aided colleges on superannuation, clause 5 would become violative of Article 14, is clearly barred by principles of constructive res-judicata and if entertained would amount to my going behind the finding implicitly reached by the Division Bench to the effect that clause 5 as interpreted by them is a legal and valid provision."

18. On the basis of the above rulings of this Court as well as of the Hon'ble Supreme Court, Mr. Patel has submitted that this Court should not pass any order either expressly or impliedly overruling the judgment rendered by this Court in earlier petition. Mr. Patel has further submitted that all the contentions sought to be raised in this petition were raised before the Revenue Tribunal initially in the Revenue Application and they were negatived by the Tribunal. He has further submitted that the same contentions were raised and dealt with by the Tribunal again in the Revision Application. He has further submitted that the contention raised on the provisions of the Gujarat Town Planning and Urban Development Act was also raised before this Court in the

earlier petition, i.e., Special Civil Application No. 6131 of 1998 and the said petition was dismissed by this Court. The Review Application filed was also dismissed. The contentions based on the provisions of the Town Planning Act were also raised in the Letters Patent Appeal which came to be dismissed and the same contentions were also raised before the Hon'ble Supreme Court in Special Leave Petition which was ultimately withdrawn. In this view of the matter the same contentions cannot be permitted to be raised in the present petition. He has therefore submitted that it is not open for the petitioner to agitate the same contentions once again in the present petition.

19. Mr. Patel has further submitted that under Section 85(2) of the Tenancy Act, the orders passed by the Mamlatdar,Collector and the Gujarat Revenue Tribunal are made final which cannot be questioned in any civil or criminal Court and therefore the order passed by the Tribunal and confirmed by this Court has become final. This finality cannot be altered by resorting to hyper-technical contentions which were raised by the petitioner in the earlier petition also. Mr. Patel has further submitted that Section 19(2) of the Bombay Town Planning Act, 1954 and Section 46(2) of the Gujarat Town Planning Act, 1976 contemplate settlement of disputes by filing a suit in a Court of competent jurisdiction. The competent Court in the presetn case is the Tenancy Court which has settled the dispute and the settlement made by the Tenancy Court is final and conclusive. Mr. Patel has further submitted that the Tenancy Court is equivalent to a Civil Court in the context of the disputes arising under the Tenancy Act. The explanation to Section 85 of the Act contemplates settlement of issues arising under the Tenancy Act by the Mamlatdar. The Tenancy Court is equivalent to a Civil Court under the provisions of the Mamlatdar's Courts Act, 1906 and the Mamlatdar's Court is a Civil Court under the provisions of Section 85A of the Tenancy Act. He has further submitted that a sale in favour of a non-agriculturist is declared to be invalid under Sec. 63 of the Tenancy Act. When such sale is invalidated at any point of time, invalidation reverts back to the date of sale, because Sec. 63 contemplates "No sale shall be valid". It starts with non-obstante clause and therefore the contention of the petitioner that the sale deed continued to be valid upto 1994 and became invalid only thereafter is erroneous and cannot be entertained.

20. Mr. Patel has further raised the issue that even if all the aforesaid contentions are negatived by this

Court, the petition deserves to be dismissed with exemplary costs on the ground that the petitioners have suppressed material facts before this Court. He has submitted that the petitioners have filed Special Civil Application No. 6310 of 1996 on 9.8.1996. The order of the Deputy Collector on tenancy side was challenged before the Gujarat Revenue Tribunal by the petitioner on 25.9.1995. Therefore the petitioners knew that they have no title to the land. Despite this fact, the petitioners practised fraud in Special Civil Application No. 6310 of 1996 on this Court and obtained order in their favour by suppressing material facts. Even though the sale deed was invalid the petitioner had contended that the sale deed was valid. The petitioners have not impleaded all the interested persons as parties to the petition. On the petitioners' own admission the plots were allotted to two persons, however in the petition the petitioners have claimed that the plots are of their ownership. He has further submitted that when the present petition was filed on 10.9.1997, the petitioners knew that the Tribunal had dismissed their Revision Application on 8.9.1997 i.e., two days before filing of present petition. In the first petition, the petitioners have contended that they had purchased the land in question though they knew that the sale was declared to be invalid. In the present petition, the petitioners have purchased the sale deed and relied upon the same ground though they knew that sale was declared invalid and confirmed by Gujarat Revenue Tribunal. The petitioners did not implead all the interested persons as parties and surreptitiously filed the present petition. He has further submitted that the petitioners have not produced the orders passed by the Revenue authorities. He has further submitted that the petitioners have also withheld requisite and relevant documents qua the orders of Tenancy Courts from the Hon'ble Court in Special Civil Applications No. 6310 of 1996 and 7010 of 1997 which conduct on the part of the petitioners is required to be held to be a fraud. He has further submitted that on 24.1.1997 the petitioners had approached the respondent Corporation and produced the order in the earlier petition. However, the petitioners did not disclose that the sale deed was invalidated. Mr. Patel has further submitted that the learned Single Judge of this Court in Special Civil Application No. 6131 of 1998 has found that the petitioner has practised a fraud on the authorities below. He has further submitted that all the contentions sought to be raised by the petitioners are based on the ground that the petitioners had purchased the land lawfully. However the moment the sale in their favour is held to be invalid all the contentions raised

by the petitioners stand negatived and have been negatived by all the parties below and by the Hon'ble Supreme Court.

21. In support of his submission with regard to the dismissal of the petition on the ground of suppression of material facts and fraud, Mr. Patel has relied on the decisions of the Hon'ble Supreme Court as well as of this Court. Mr. Patel has relied on the decision of this Court in the case of Ghelabhai Popatbhai Tarpara and Others Vs. Agricultural Produce Market Committee, Kalawad and Another - 1988 (2) GLH 463, wherein it is held that "the petitioners are guilty of suppression of material facts and they have deliberately distorted the facts by making material suppression as regards the pendency of the suit in Civil Court. In view of this matter it would not be appropriate for this Court to exercise the power under Article 226 of the Constitution of India and extend the protection of high prerogative writs to the petitioners. Not only that the petitioners have abused the process of the Court and have taken interim relief by making deliberate distortion of facts and by suppressing important relevant material. Therefore, all the petitions are required to be rejected on this ground alone." Mr. Patel has further relied on the decision of the Hon'ble Supreme Court in the case of S.P. Chengalvaraya Naidu (dead) by L.Rs. vs. Janannath (dead) by L.Rs. and others - AIR 1994 S.C. 853 wherein it is held that "The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. It can be said without hesitation that a person whose case is based on falsehood has no right to approach the Court. He can be summarily thrown out at any stage of the litigation. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party." Mr. Patel has further relied on the decision of this Court in the case of Jivan Sadhna Rajasthan Hindi Vidya Mandal vs. State of Gujarat - 2002 (1) G.L.H. (U.J.) 5 wherein it is held that "suppression of facts which are material and which have bearing on the outcome of the petitions would result into not only rejection of the petition but saddling the petitioner with exemplary costs." Mr. Patel has, therefore, strongly urged that the petition be dismissed with exemplary cost.

22. Mr. Prashant G. Desai, learned advocate appearing for the respondent No.1 Corporation submits that Special Civil Application No. 247 of 1974 came to be dismissed by this Court and in the said petition the Corporation was not a party. He has further submitted that there was no order passed by this Court in the said petition for handing over possession of the land bearing final plots No. 634/1 and 634/2 by the respondent to the petitioners. Mr. Desai has further submitted that as per the orders dated 20th May 1985 and 19th June 1993 passed by the competent authority, Urban Land Ceiling, Surat, the land admeasuring 13745.35 sq.meters was declared as excess vacant land and only one unit came to be allotted to the petitioners. He has further submitted that as per the judgment and order passed by this Court in Special Civil Application No. 6310 of 1996, the petitioners had to produce evidence showing ownership of the land before the respondent and if the respondent considers the same as satisfactory, then the compensation in that respect was to be paid and vacant possession of final plot No. 634/1 and 634/2 was to be handed over. He has however submitted that as per the records of Town Planning Scheme the land in question of original plot No. 634 as per the 'B' Form the name of the original owner is mentioned as Smt. Induben Dilipbhai Desai. She has produced documentary evidence showing her ownership and her shares and has asked for her rights in the said land. He has further submitted that during the pendency of the petition, there was constant demand from the respondents No. 2 and 3 for allotment of the land and as the petitioners have failed to obtain the order of stay in their favour, the respondent No.1 had to hand over the possession to the respondents No. 2 and 3 and hence the petitioners do not deserve for any relief from this Court in the present petition.

23. Mr. MC Bhatt, ld. advocate appearing for the petitioners, while dealing with the preliminary objection raised by Mr. AJ Patel and the arguments of Mr. PG Desai, has submitted in Rejoinder that Special Civil Application No. 247 of 1974 though dismissed by this Court the award which was confirmed by the Board of Appeal was confirmed by this Court also and the Town Planning Scheme by which the petitioners were entitled for two final plots No. 634/1 and 634/2 in lieu of land situate in Survey No. 16 of Athwa admeasuring about 15254 sq.meters was confirmed. He has further submitted that the respondent No.1 has deliberately avoided to implement the scheme and the award and all throughout due to the total inaction on the part of the respondent No.1

Corporation the petitioners have been deprived of their fundamental and legitimate right. He has further submitted that in view of the representation made by the petitioners before the respondent No.1 Corporation as directed by this Court, while disposing of the Special Civil Application No. 6310 of 1996, registered sale deed was produced before the respondent No.1 Corporation and hence there was no question for the respondent No.1 Corporation to show its ignorance with regard to the registered Sale Deed dated January 31, 1968. Mr. Bhatt has further submitted that the name of respondent No.2, namely Smt. Induben Dilipbhai Desai was entered in 'B' Form subsequently though the respondent No.2 has already waived her right by allowing Pauper Application No. 100 of 1984 in the unnumbered suit to be dismissed for default on July 6, 1987 and also while not taking further recourse to get the same restored or in any other mode. Mr. Bhatt has further submitted that no right had accrued in favour of respondent No.2 and even if any right had been accrued the same had been waived by respondent No.2. He has further submitted that by way of registered release deed the land in question came to the share of respondent No.3 prior to the marriage of respondent No.3 with respondent No.2 and the moment the respondent No.3 has got his individual share from HUF property the property had lost its status of ancestral property and anything like that. He has therefore submitted that the respondent No.2 was not entitled to ask for any relief or any right before any authority or any Court. He has further submitted that while preferring appeal before the Board of Appeal the petitioners being the sole owners and in occupation of the land in question were not required to join either the respondent No.2 or the respondent No.3 as the necessary parties. Mr. Bhatt has further submitted that the Revenue entry in the City Survey came to be mutated soon after the execution of the registered Sale Deed and accordingly the Government had issued Sanad in favour of the petitioners. He has further submitted that the respondent No.2 who claims to be a co-owner/co-sharer had neither objected to against the issuance of such Sanad nor taken any action to represent their case either before the Town Planning Authority or before the Revenue authority or before the competent authority under the Urban Land Ceiling Act. He has further submitted that the cancellation of the Revenue entry in the village form No. 7/12 by the lower Revenue authorities has not become final as the dispute with regard to the mutation of Revenue Entry in village form No. 7/12 is still pending with the Secretary, Revenue (Appeals), State of Gujarat, Ahmedabad. Mr. Bhatt has further submitted that the

proceedings initiated by the ALT under Section 84(c) of the Bombay Tenancy Act and finalised upto the Hon'ble Supreme Court, has nothing to do with the cause of action of the present petition filed by the petitioners. He has further submitted that it is an attempt on the part of the respondent No.3 by joining hands with his ex-wife i.e., the respondent No.2 projecting her through his brother in the capacity of a power of attorney holder to grab the land in question or to extract money from the petitioners by adopting such tactics after pocketing the considerable amount of the land way back in 1968. Mr. Bhatt has further submitted that the proceedings under Section 84(c) of the Tenancy Act were initiated without any authority, powers and jurisdiction. He has further submitted that Section 88(b) of the said Act provides for the exemption of certain land from operation of the entire Tenancy Act. In exercise of the powers under Section 88(b) of the Tenancy Act, the then State of Bombay issued a notification on 1.2.1957 and inter alia exempted the land situated within the borrough Municipality of Surat from the operation of the Tenancy Act. The land in question covered by the disputed sale deed formed part of borrough Municipality at the relevant time. Mr. Bhatt has also relied on the Notification issued dated 17.10.1964 issued by the Government of Gujarat in this behalf.

24. With regard to preliminary objection against the maintainability of the present petition on the ground of bar of res judicata and constructive res judicata, raised by Mr. AJ Patel, the ld. advocate appearing for the petitioner, Mr. Bhatt has submitted that earlier petition being Special Civil Application No. 6310 of 1997 was disposed of with a direction to approach the respondent No.1 Corporation with a copy of Sale Deed and it was also observed therein that if decision would go against the petitioners liberty was granted to approach this Court again. While disposing of the earlier petition, this Court has not adjudicated the issues involved in the petition and there was no decision on merits. Mr. Bhatt has, therefore, submitted that res judicata would not come in the way of entertaining the petition. In this connection, he has relied on the decision of the Hon'ble Supreme Court in the case of P.N. Subramanyam Reddy Vs. A.P. State Road Transport Corporation and Others - AIR 1992 S.C. 142, wherein the Hon'ble Supreme Court has observed that once the Division Bench of the High Court has reserved liberty to the appellant in writ petition to enable him to agitate the same issue before the High Court in case he was aggrieved by the decision of specific authority before which he was

asked to make representation, and if the appellant files petition after rejection of representation, observations of the Single Judge in decision of the earlier petition cannot be raised as bar to appellant agitating said question in subsequent petition.

25. Mr. Bhatt has further relied on the decision of the Hon'ble Supreme Court in the case of Kunwar Ram Nath and Others - Vs. The Municipal Board, Pilibhit - AIR 1983 S.C. 930, wherein it is held that "In the earlier writ petition, the appellants had challenged the validity of the new octroi byelaws and the imposition of octroi on many articles brought by them into the municipal limits. By reason of the dismissal of the writ petition, they would no doubt be not entitled to reagitate the same question. In the case on hand before the Supreme Court, the question involved is a different one and that is whether even if the octroi byelaws and the imposition of octroi on sugarcane were good, the Municipal Board of Pilibhit is competent to recover octroi on sugarcane brought by rail by reason of the exemption accorded under Section 157(3). The Court has therefore taken the view that it was open to the appellants to contend even after the dismissal of the earlier petition that they are entitled to the limited exemption granted by the order of 1936, generally in favour of a number of sugar factories in several municipal areas." Relying on this decision, Mr. Bhatt has submitted that the dismissal of the earlier petition would not come in the way of the petitioner to reagitate the claim made before this Court in earlier petition.

26. Mr. Bhatt has also relied on the decision of the Hon'ble Supreme Court in the case of Rattan Lal Sharma Vs. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and others - AIR 1993 S.C. 2155, wherein it is held that "Generally, a point not raised before the Tribunal and administrative authorities may not be allowed to be raised for the first time in the writ proceeding, more so when the interference in the writ jurisdiction which is equitable and discretionary is not of course or must. But if the plea though not specifically raised before the subordinate tribunals or the administrative and quasi-judicial bodies, is raised before the High Court in the writ proceeding for the first time and the plea goes to the root of the question and is based on admitted and uncontroverted facts and does not require any further investigation into a question of fact, the High Court is not only justified in entertaining the plea but in the anxiety to do justice which is the paramount consideration of the Court, it is

only desirable that a litigant should not be shut out from raising such plea which goes to the root of the lis involved."

27. Mr. Bhatt has further relied on the decision of the Hon'ble Supreme Court in the case of Govindbhai Gordhanbhai Patel and Others vs. Gulam Abbas Mulla Allibhai and others - AIR 1977 S.C. 1019, wherein the Hon'ble Supreme Court has held that "it is well recognised that the dismissal of a proceeding by an authority not on merits but merely on account of a formal defect will not attract the applicability of the general principles of Res Judicata and will not debar the authority exercising concurrent jurisdiction from entertaining the subsequent proceedings for the same relief and passing proper orders on merits." The Court has therefore taken the view that the previous order passed by the Prant Officer being merely an administrative order and not having been passed on the merits of the case, it did not, in the absence of a statutory prohibition, impair the power of the Collector to pass the impugned order on the merits of the matter under proviso to S. 63(1) of the Act or the grant of the requisite certificate under R. 36(f) of the Rules.

28. Mr. Bhatt has further relied on the decision of the Hon'ble Supreme Court in the case of Piarey Lal v. Hori Lal - AIR 1977 S.C. 1226, wherein after considering the relevant provisions contained in U.P. Consolidation of Holdings Act (5 of 1954) and after considering the order of consolidation allotting new plots for earlier plots in respect of which agreement for sale had been executed, the Hon'ble Supreme Court has held that "While High Court took note of the fact that the rights, title, interests and liabilities of the tenure-holder in his original holdings created and he acquired the same rights, title, interests and liabilities in "chak" allotted to him, it lost sight of the significance of the word "in" and the aforesaid provisions of Section 54 of the Transfer of Property Act, and disposed of the controversy before it by raising the other question whether the tenure-holder was subject to any liability in respect of his old holding. That was why it fell into the error of holding that a liability was created in the original holding of the defendant, and was transferred to his "chak" on his entering into its possession. As has been shown, that was an erroneous view which has to be rectified." On the basis of this judgment, Mr. Bhatt has submitted that since all rights, title and interests acquired by the petitioners as a result of the Deed of Conveyance, in respect of the original property, were

already ceased by virtue of the acquisition of their property under the Town Planning Act and allotment of the new property made in favour of the petitioners, the proceedings under Section 84-C of the Tenancy Act would not apply to the new property allotted to the petitioners under the Town Planning Scheme.

29. With regard to the second preliminary objection raised by Mr. Patel against the maintainability of the present petition, i.e., suppression of material facts, Mr. Bhatt has submitted that the petitioner has not suppressed any material and all facts have come to the notice of the Court during the course of the proceedings. Mr. Bhatt has further submitted that proceedings under Section 84-C of the Tenancy Act are altogether different proceedings and the said proceedings had nothing to do with the issue involved in the present petition. Even otherwise, the petitioners were genuinely and bona fide agitating the said proceedings before the higher authorities and during the pendency of the present proceedings, the said proceedings under Sec. 84-C of the Tenancy Act were reached upto the Hon'ble Supreme Court. There was no bad faith on the part of the petitioners not to disclose the status of the said proceedings in the present petition. Even if it is assumed that the said proceedings would have some remote connection with the issue involved in the present petition, it was an innocent failure to disclose the material facts. In this connection, he has relied on the decision of the Delhi High Court in the case of Penguin Books Ltd., England vs. M/s. India Book Distributors and others - AIR 1985 Delhi 29, wherein it is observed that "The maxim of clean hands must not be taken too widely. "Equity does not demand that its suitors shall have led blameless lives", as Brandeis J. said. (Loughran v. Loughran (1933) 292 U.S. 216, 219). What bars the claim is not a general depravity but one which has "an immediate and necessary relation to the equity sued for". (Snell's Equity 28th Ed. p. 33). It was further observed that "There was no bad faith. It was an innocent failure to disclose a material fact. The maxim withholds assistance of Court where the wrongdoer is trying to enjoy the fruits of his own wrong. It is not a maxim of which a defendant can take advantage. It is a self-imposed ordinance that closes the door of a Court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief".

30. Mr. Bhatt has further relied on the decision of the Rajasthan High Court in the case of Mohd. Usman Vs. Union of India and others - AIR 1984 Rajasthan 156,

wherein it is held as under:

> "When there is a conscious suppression of material facts and a party gets the advantage in one or the other way then the benefit of extraordinary jurisdiction under Art. 226 or Art. 227 of the Constitution should not be extended in its favour. The question of suppression of material facts is relevant specially when the stay order is obtained or even on the basis of the writ petition, the admission order obtained. If no stay order is obtained or no admission order is obtained and the facts are brought to the notice of the Court in one way or the other then the question of suppression of material facts loses its importance. Thus, where in a petition by the bidder challenging cancellation of auction sale, the fact that the refund of money deposited at auction, was accepted by the petitioner was brought to the notice of the Court at the earliest opportunity and that too, before the stage of admission and he had not obtained any stay order or even the order of admission of the writ petition it could be said that the petitioner had acted bona fide. In number of cases, one may miss the facts in the writ petition inadvertently but the facts can be brought to the notice of the Court at any stage of the proceedings. In the aforesaid circumstances the question of suppression of material facts loses its importance and the dismissal of writ petition on that ground was held unjustified."

31. Having considered the rival submissions of the parties and having gone through the entire record of the case as well as the proceedings involved in the previous litigations between the parties and the authorities cited by both the sides in their support, this Court found that there is no much substance in the preliminary objections raised by Mr. AJ Patel, ld. advocate appearing for the respondents No.2 and 3 and the present petition cannot be dismissed on the ground of bar of res judicata nor can it be dismissed on the ground of suppression of material facts. The proceedings under Sec. 84-C of the Act and the relief claimed in the present petition on the basis of the allotment of the plots made in favour of the petitioners on the basis of Town Planning Scheme finalised under Bombay Town Planning Act cannot be placed on the same footing and hence the earlier proceedings

would not come in the way of the petitioner to claim the relief in this petition. Even otherwise, during the pendency of the writ petition, the respondent No.1 Corporation has handed over possession of the disputed properties to respondents No. 2 and 3 and that has given a fresh cause of action and though the amendment was initially refused by the learned Single Judge of this Court, the Letters Patent Appeal filed against the said order was allowed and amendment was granted. Pursuant to the said amendment, the petitioners were entitled to agitate the issue regarding handing over possession of the disputed property to the respondents No. 2 and 3 in the present petition and in any case it was not the subject matter of the earlier proceedings. There is no much substance even with regard to the second preliminary objection, i.e., suppression of material facts. It was the genuine and bonafide belief of the petitioners that the said proceedings are altogether different proceedings and had nothing to do with the relief claimed in the present petition. Even otherwise the petitioners were agitating the said issue all throughout and matter reached upto the Hon'ble Supreme Court. During the course of the proceedings of the present petition the said fact has come to the notice of every one and hence it cannot be said that the petitioners have suppressed the said facts. Even otherwise the petitioners have disclosed all material facts with regard to purchase of land bearing Survey No. 16 by registered Sale Deed dated 31st January 1968, the reservation of the said land for public purpose on introduction of the town planning scheme and in lieu thereof allotment of 2 plots bearing Survey Nos. 634/1 and 634/2, proceedings under the Urban Land (Ceiling & Regulation) Act and orders passed thereunder, filing of Special Civil Application No. 247 of 1974 and Special Civil Application No. 6310 of 1996. The outcome of 84-C proceedings was not disclosed under the bonafide impression that the said proceedings were in respect of the old property bearing Survey No. 16 and since the petitioners have lost right, title and interest in the said property and have acquired new rights in the property bearing final plot No. 634/1 and 634/2 the said facts were not necessary to be disclosed in the present petition. In any case the said facts have come to the notice of the Court during the course of the proceedings and the petitioners have not derived any undue advantage. The petition therefore cannot be thrown out on the ground of suppression of material facts.

32. It further appears to the Court that the present petition was filed mainly because of the fact that pursuant to the order passed by this Court in Special

Civil Application No. 6310 of 1996 the respondent Corporation has not taken any action with regard to the allotment of the property bearing final plots No. 634/1 and 634/2 and hence the specific prayer to this effect was made by the petitioners in this petition. It is the allegation of the respondent Corporation that the petitioners have not produced the sale deed before the authority and hence consequential action could not be taken. In this regard, the petitioners have produced the relevant documentary evidence showing that the sale deed etc., was produced before the respondent No.1 corporation and yet the decision was not taken. It is also found that during the pendency of the petition, the respondent No.1 Corporation has tried to overreach the process of the court by handing over possession of the disputed plots to the respondents No. 2 & 3. The petitioners have come to know by communication dated 13.11.2001 stating that pursuant to the order passed by this Court in L.P.A. No. 10 of 2001, the possession was handed over to the respondents No. 2 and 3. As a matter of fact, no such directions were given by this Court in LPA No. 10/2001. The respondent corporation has misinterpreted the judgment delivered by this Court in the said Letters Patent Appeal.

33. The Court has further found that the petitioners purchased the land bearing Survey No. 16 of Village Athawa admeasuring 15234 sq.meters from respondents No. 2 and 3 and the sale deed was executed in favour of the petitioners on 31.1.1968. This land of Survey No. 16 of Village Athawa was included in the draft town planning scheme known as town planning scheme No.5 of Kapadra and the draft scheme was sanctioned on 14.4.1968 under the provisions of the Bombay Town Planning Act. The final town planning scheme was sanctioned on 25.1.72 under the provisions of the Bombay Town Planning Act. In pursuance of the said town planning scheme, in lieu of the land bearing survey No. 16 admeasuring about 15254 sq.meters, land bearing final plot No. 634/1 admeasuring 775 sq.meters and land bearing final plot No. 634/2 admeasuring 920 sq.meters were allotted. The petitioners were aggrieved and dissatisfied by the said allotment and hence preferred two separate appeals before the Board of Appeals constituted under the Bombay Town Planning Act. The said appeals were partially allowed in favour of the petitioners. However being further aggrieved and dissatisfied with the decision of the Board of Appeals the petitioners preferred Special Civil Application No. 247 of 1974 before this Court and this Court vide its order dated 2.9.1975 dismissed the said Special Civil Application. However, the Court has made observation

that the disputed lands, bearing final plot No. 634/1 and 634/2 were allotted to the petitioners. The petitioners and the tenants were all evicted long back from the tenure land and before decades Ring Road was laid down on the land bearing Survey No. 16. The entire land of Survey No. 16 was acquired for public purpose for laying down the Ring Road and in newly constituted plots were allotted at some other place.

34. It has also been found from the record that in the year 1994 the Mamlatdar and ALT initiated proceedings under Sec. 84-C of the Bombay Tenancy and Agricultural Lands Act, 1948. The said case was numbered as Tenancy Case No. 60/94 and it was in respect of the property purchased under the deed of conveyance dated 31.1.1968 executed by the respondents No. 2 and 3 in favour of the petitioners. The Mamlatdar & ALT by his order dated 30.6.1994 declared the said transaction as invalid and directed the parties to restore the original position and failing which directed that the land be forfeited to the Government. The said order of the Mamlatdar was the subject matter of suo motu revision bearing Revision Case No. 166/94 by the Deputy Collector and the notice under Section 76A of the Act was discharged with certain observations. These orders were the subject matters of the further proceedings by way of Revision Application before the Gujarat Revenue Tribunal, Special Civil Application and Letters Patent Appeal before this Court and Special Leave Petition before the Hon'ble Supreme Court and the present petitioners had all throughout lost the said litigations.

35. The Court has further found that the petitioners were constrained to file Special Civil Application No. 6310 of 1996 before this Court seeking a direction against the Surat Municipal Corporation to hand over the possession of the disputed plots to the petitioners and the same was disposed of by this Court (Coram: S.D. Dave, J.) on 16.1.1997. By this judgment and order the respondent No.1 corporation was directed to decide the claim of the appellant in respect of the disputed plot within a period of 4 weeks. It was further observed that in the eventuality of any adverse order passed against the petitioners the petitioners could challenge the said action. Since no action was taken by the respondent corporation despite the direction having been given by this Court the petitioners have filed the present petition before this Court.

36. The Court has found much substance in the submissions of Mr. Bhatt that the provisions of the

Bombay Town Planning Act, more particularly Section 19 deals with disputed ownership of the property and in inclusion of such property in the town planning scheme. The decision is required to be taken by the officer that might be appointed by the State Government and the decision of the officer so appointed by the State Government is binding to all concerned except only one exception, that any suit in competent court of civil jurisdiction is not barred and in the eventuality of Civil Court passing a decree wherein the decision of the said officer would be varied, then such decree would operate. It is an admitted position that at no stage the respondents No. 2 and 3 have disputed the vesting of ownership of the original land bearing Survey No. 16 in the petitioners before the town planning scheme was finalised. Sec. 53(b) of the Town Planning Act in terms provides that all rights in the original plots which have been reconstituted shall determine and the reconstituted plots shall subject to the rights settled by the Town Planning Officer. Section 51(3) of the said Act further provides that on and after the date fixed in the notification for the operation of the final town planning scheme, it shall have effect as if it was entered under the Bombay Town Planning Act. In view of these statutory provisions contained in the Bombay Town Planning Act and in view of the fact that the Gujarat Town Planning Act also makes the same provision, the decision taken by the Town Planning authority at the stage of finalisation of the town planning scheme regarding the rights, title and interest of the concerned person in the reconstituted plots is binding to all concerned and settlement of such rights become the part of the Act. It is an admitted position that there was no dispute that the sale deed was executed on 30.1.1968 in favour of the petitioners and it was not under challenge before any authority till the town planning scheme was finalised and the town planning authority had allotted two newly constituted plots to the petitioners as well as the respondents No. 2 and 3. This was the binding decision regarding determination of the rights of the parties in the reconstituted plots and any order passed by the Mamlatdar under Sec. 84-C of the Tenancy Act in the year 1994 could not have any effect on the ownership rights of newly constituted final plots under the town planning scheme.

37. It is further found that the issue as to who has right, title and interest over two newly constituted final plots, is not an issue which is governed by the principles of res judicata or the principles analogous to res judicata. No authority or court has so far taken the decision that the newly constituted plots exclusively

belong to the respondents No.2 and 3. It is settled position in law and this Court has already taken the view in the case of Mavjibhai Dharsibhai and Ors. vs. State of Gujarat & Ors - (1994) 35(2) GLR 1168 that the transaction in breach and violation of Section 63 of the Tenancy Act is a invalid transaction and it is not void transaction. The invalid transaction is required to be declared as such and therefore it operates till it is declared invalid and void transaction is non-est and nonexistent transaction and it is ineffective from its inception. IN the present case, it is not in dispute that the sale transaction of 1968 was invalidated for the first time in the proceedings initiated in the year 1994 and therefore upto 1994 the sale transaction of 1968 was in operation. Therefore, the sale transaction was in operation in 1972 when the town planning scheme was finalised and accordingly whatever the decision was taken by the Town Planning Officer in respect of the ownership of the newly constituted plots in 1972, could not be disturbed by 1994 decision under Sec. 84-C of the Tenancy Act. As observed earlier, on town planning scheme being finalised all rights, title and interest of the owners of the original survey number came to an end. The tenure of the original land came to an end and the relations of any person with any land covered in the Town Planning Act are knocked down and the owner of the original Survey number was only entitled to claim the right, title or interest in the newly constituted final plots as per the rights settled by the Town Planning Officer under the finalised Town Planning Scheme. In the case of Murtujakhan Joravarkhan Babi vs. Municipal Corporation of Ahmedabad - (1975) 16 GLR 806, this Court has held that on the sanction of the final scheme by statutory operation the title of the various owners is readjusted and these consequences are provided in Section 53 of the Town Planning Act. Under Section 53(a) of the Act, all lands subjected to the scheme which are allotted to the local authority vest in it. Under Section 53(b) of the Act, these lands which do not vest absolutely in the local authority but which are otherwise reconstituted, become subject to the rights settled by the Town Planning Officer. In both the cases, all rights in the original plots stand determined and new ownership rights come into existence. The Full Bench Decision of this Court, in the case of Saiyad Mohammed Abdulamiya Uraize vs. Ahmedabad Municipal Corporation (1977) 18 GLR 549 has also taken the same view and held that where admittedly no right have been reserved by the Town Planning Officer in the Final Scheme as in the case of the petitioners, their right to occupy has come to an end by the statutory force of the scheme which has now become

a legislative measure. In such a case, once the property has vested absolutely in the local authority and all rights of these persons occupying the same have come to an end, the eviction power would be merely an administrative power of eviction. The Division Bench of this Court in the case of Kashiben Wd./o Pitamber Devchand & Anr. vs. State of Gujarat & Anr. - (1989) 30(2) GLR 1176 has also taken the same view under the new Act, i.e., Gujarat Town Planning and Urban Development Act, 1976. It is held therein that as per the provisions of Section 124 of the new Act, the proceedings taken under the old Act were continued and the scheme came to be sanctioned as early as 27.10.1980, which was subsequently made final on 28.7.87. Section 65(3) of the Act which reads "on and after the date fixed in such notification, the preliminary scheme, or the final scheme, as the case may be, shall have effect as if it was enacted in this Act", makes it clear that, once the preliminary scheme is sanctioned, it becomes the part of the Act. It is clear that not only the lands included in the preliminary scheme vest absolutely in the appropriate authority, but the preliminary scheme have the effect as if it were enacted in this Act.

38. In view of the statutory provision and the consistent trend of judicial decisions of this Court, the respondents No. 2 and 3 or any other person could not have claimed any right, title or interest in the old Survey number after 1972, and the only claim which anybody can make would be qua reconstituted final plots and subject to the rights settled by the town planning officer. The proceedings undertaken by any authority in respect of any transaction pertaining to the land which has been vested in the Corporation free from all encumbrances in 1972, are totally insignificant to determine the right, title and interest in the newly constituted final plots.

39. The Court has also found that the petitioners have been continuously agitating for more compensation and for allotment of more land in lieu of original survey number. The petitioners have preferred two appeals before the Board of Appeals and also preferred Special Civil Application in the year 1974 claiming more land and for asking more compensation. The respondents No. 2 and 3 have neither litigated nor made any claim in respect of the original Survey No. 16 or in respect of newly constituted final plots till the town planning scheme is finally sanctioned. Even in the year 1994 when proceedings under Sec. 84-C of the Tenancy Act were initiated, the respondents No. 2 and 3 had not chosen to

make any claim in respect of the original survey number or the newly constituted final plots. This Court is therefore of the view that entire litigation under Sec. 84-C of the Tenancy Act was pertaining to land bearing Survey No. 16 and with reference to the breach of Sec. 63 of the Tenancy Act and all decisions rendered in the said proceedings can never operate as res judicata in respect of the petitioners claim to the reconstituted final plots. The Court is also of the view that in the year 1994 when the Mamlatdar passed order invalidating the sale of 1968 not only the land of original survey number was vested in the local authority but the Ring Road was also laid down. Therefore, the alleged restoration as a result of 84-C proceedings was only notional and observations made regarding restoration of the land in the said proceedings gets significance in the background of the law and in the context in which the said observations were made.

40. The Court has also found substance in the submission of Mr. Bhatt that once the town planning scheme is finalised it becomes part of the Act. The same town planning scheme became part of the Bombay Town Planning Act. The Bombay Town Planning Act stood repealed by the Gujarat Town Planning Act. Saving clause only saves the continuation of the proceedings of implementation and execution of the town planning scheme under the new Act. While executing and implementing the town planning scheme the Surat Municipal Corporation had no authority, powers or jurisdiction to review or amend or alter the town planning scheme. The determination of the title of the petitioners and the respondents No. 2 and 3 in respect of the two newly constituted final plots became the part of the Bombay Town Planning Act. Therefore under the Gujarat Town Planning Act, the respondent No.1 Corporation could have only implemented the town planning scheme as per the rights settled by the town planning officer but in the present case the respondent corporation has on its own without authority, powers or jurisdiction varied or modified the town planning scheme and it was beyond the authority, powers and jurisdiction of the respondent no.1 corporation. The action of the respondent no.1 corporation of handing over the possession of the entire property in question to the respondents No. 2 and 3 is therefore not held to be justified.

41. The Court further takes note of the fact that the newly constituted plot No. 634/1 and 634/2 were jointly allotted to the petitioners as well as respondents No. 2 and 3 and hence even if the petitioners have claimed the

handing over of possession of the entire plots No. 634/1 and 634/2 in the present petition the same could not have been granted and his claim is therefore restricted to one-half of the land covered under the newly reconstituted plots. The Court also takes note of the fact that the transaction is of 1968 and the present petition is decided in 2003. About 35 years have passed and still the petitioners could not enjoy the fruits of the properties purchased in 1968. But for the invocation of the 84-C proceedings in 1994, the petitioners would have got the entire properties much earlier.

42. Looking to the foregoing facts and circumstances of the case and considering the relevant statutory provisions and judicial pronouncements, this Court is of the view that interests of justice would better be served if the petitioners are given one-half of the properties of the newly constituted final plots No. 634/1 and 634/2 and for that purpose the respondent No.1 is hereby directed to hand over the possession of one-half of the said property to the present petitioners. If the possession of the entire properties is already handed over to the respondents No. 2 and 3 the respondent No.1 is directed to take back the possession of one-half of the said property from the respondents No. 2 and 3 and respondents No. 2 and 3 are hereby directed not to obstruct the respondent No.1 from taking the possession of one-half of the said property and handing it over to the present petitioners. The respondents are directed to make compliance of this direction within one month from the date of receipt of writ or certified copy.

43. If it is not possible to hand over the one-half portion of the properties in question to the petitioners, it is hereby directed that the respondents No. 2 and 3 shall refund the entire amount of sale consideration which was paid by the petitioners in the year 1968 at the time of execution of sale deed, with interest at the rate of 18 per cent p.a. from the date of receipt such sale ocnsideration till the amount is actually paid or one-half of the present market value of the property in question, whichever is higher, within one month from the date of receipt of the writ from this Court or from the date of certified copy of judgment whichever is earlier.

44. With these directions, the petition is partly allowed. Rule is made absolute to the above extent without any order as to costs.

[K.A. Puj, J.]

rmr.